No. 13,970

United States Court of Appeals
For the Ninth Circuit

WONG GONG FAY,
Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney General of the United States,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant herein claims to be the son of Wong Hie, alleged to be a citizen of the United States at the time of his birth in China. Paragraphs II, III, and IV of the complaint allege:

> II. That plaintiff has been, and at all times herein stated, is still being held in restraint and being denied his liberty by the defendant in that the plaintiff is confined to the Immigration Detention Quarters at San Francisco, California, and further that the defendant has ordered the plaintiff to be deported from the United States as an alien.

III. That plaintiff's father, Wong Hie, is a citizen and national of the United States and is now a resident of the City and County of San Francisco, California, and further that the plaintiff was born on May 15, 1926, in Toyshan, Kwangtung, China, and that the plaintiff herein is the natural and legitimate son of the above-named Wong Hie and further that the plaintiff is a citizen and national of the United States by virtue of the provisions of Revised Statutes 1993, as amended, and further that the plaintiff is a resident of the City and County of San Francisco, California.

IV. That plaintiff claims a right and privilege as a national and citizen of the United States and further claims the attending rights and privileges to enter and remain in the United States and to enjoy all pertinent rights and privileges therein, and further that plaintiff alleges that defendant herein named has denied and still continues to deny said rights and privileges to the plaintiff and that the executory officials of the Department of said defendant have denied and continue to deny the plaintiff such rights and privileges as a national and citizen upon the grounds that the plaintiff herein named is not a national and citizen of the United States.

The answer denies the claimed relationship to Wong Hie and denies that the appellant is a citizen of the United States.

After appellant's arrival at the port of San Francisco, he was afforded an administrative hearing, during which he was represented by counsel. His request

for admission into the United States was denied, and after filing an action under 8 U.S.C. 903, trial was had. Following the trial, the court below found as a fact:

> *Findings of Fact:* That the person who calls himself Wong Gong Fay and who claims to be the son of Wong Hie has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Wong Hie is the natural blood father of the person, Wong Gong Fay, or that he was born at the time and place claimed, or that the person who appeared before this court claiming to be Wong Gong Fay is in truth and in fact Wong Gong Fay.
>
> *Conclusions of Law:* The person appearing before this court as plaintiff in this action is not entitled to the relief prayed for in the petition.

From the judgment denying the relief sought, the above appeal was taken.

JURISDICTION.

Appellee does not concede that the District Court had jurisdiction over the appellant's claim under 8 U.S.C. 903. On the jurisdictional question appellee relies on the argument of the Government and the briefs heretofore or hereafter submitted in the cases of *Chow Sing v. Brownell,* No. 13,746, and *Lee Mon Hong v. Brownell,* No. 13,957, now pending before this Court. The jurisdictional issue is identical and appellee contends that the final decision as to jurisdiction in the *Chow Sing* and *Lee Mon Hong* cases should

be determinative of the jurisdictional issue in this case.

STATUTES.

Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171, Title 8 U.S.C. 903.

Sec. 1993 Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797, Title 8 U.S.C. 6.

> § 903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.
>
> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which

he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, § 503, 54 Stat. 1171.

Sec. 1993, Revised Statutes.

All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States, but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Act of May 24, 1934—48 Stat. 797.

Citizenship of Children Born Abroad of Citizen Fathers (Acts of April 14, 1802, and February 10, 1855, as amended by Act of May 24, 1934).

Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States,

whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization. (Sec. 1, Act of May 24, 1934, 48 Stat. 797; 8 U.S.C. 6.)

QUESTIONS PRESENTED.

Appellant specifies the following points in his appeal:

(1) The court erred in holding that Wong Gong Fay, the appellant, is not the son of Wong Hai.

(2) The court erred in holding that Wong Gong Fay is not a national and citizen of the United States.

(3) The court erred in holding that the appellant failed to sustain the burden of proof.

(4) The court erred in holding that presumption in favor of the plaintiff had been dissipated.

(5) That the findings, conclusions and judgment of the District Court are unsupported and contrary to the evidence of record.

From appellant's brief it may be seen that all of the specified points are embodied in a single issue: Is the appellant the son of a recognized United States citizen?

ARGUMENT.

I. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ARE CORRECT.

The appellant states, "The gravamen of this action is one of paternity, with the resulting privilege of citizenship as a consequence thereof . . ." Inherent in the question of relationship or paternity is the matter of identity. Who is the person who claims to be the son of a citizen father? The assertion by a United States citizen of the Chinese race upon return from a visit to China that he had married a Chinese woman and that a son was born in China establishes the basis for a Chinese person at a later date to claim to be that son. Whether or not such a birth occurred is not subject to disproof—only proof can be required. Whether or not the person who makes the claim is that son is likewise only subject to the presentation of adequate proof.

The proposition sought to be sustained in this, as in many other similar cases, is: *The assertion under oath in the District Court by the claimant and the*

alleged parent that they are parent and child establishes a preponderance of the evidence sufficient to sustain the burden of proof and the defense must move forward to disprove the claim. In immigration proceedings this contention has been extremely successful. The small number of cases that have been brought to the court by way of habeas corpus well testifies to this success. The record in none of these cases, however, discloses the number of claimants who have been admitted to the United States as nationals upon proof, or rather absence of proof, that would arouse a true citizen to alarm. Many of the judges have become aware of the aura of fraud that surrounds these claims.

(1) Judge Hanford in *Gee Fook Sing v. U. S.,* 49 F. 146;

(2) Judge Hawley in *Lee Sing Far v. U. S.,* 94 F. 834;

(3) Justice Holmes in *U. S. v. Sing Tuck,* 194 U.S. 161;

(4) Justice Field in *The Chinese Exclusion Case,* 130 U.S. 581;

(5) Judge Bourquin in *Ex parte Jew You On,* 16 F. 2d 153;

(6) Judge Rudkin in *Lee Sai Ying v. U. S.,* 29 F. 2d 108;

(7) Judge Lemmon in *Fong Ging Hung v. Acheson,* (unreported), Civil Docket No. 6599;

(8) Judge Goodman in *Ly Shew v. Acheson,* 110 F. Supp. 50;

(9) Judge Westover in *Mar Gong v. McGranery,* 109 F. Supp. 821.

Certainly we cannot disagree with Judge Goodman that "We do not pass it (American citizenship) out on a platter." (*Ly Shew v. Acheson,* supra.)

In *Go Lun v. Nagle,* 22 F. 2d 246; *Gung You v. Nagle,* 34 F. 2d 848; and *Quan Toon Jung v. Bonham,* 119 F. 2d 915, and any number of other cases, this Court reviewed the proceedings of the Immigration Service on an appeal from a denial of the application for the writ of habeas corpus in the District Court.

Quon Quon Poy v. Johnson, 273 U.S. 352, is the controlling Supreme Court decision.

In each of these cases a Chinese, fresh from China, who had spent all of his life in China, who had never been in the United States, says, "I am a citizen of the United States because I am the son of Wing Doe, who is a citizen." Considering the "inestimable heritage of citizenship" which Justice Fuller in *Chin Bak Kan v. U.S.,* 186 U.S. 193, says "is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show it was ever possessed", what proof must be produced to justify any official or judge to say this man is a national or citizen of the United States? By some undisclosed process the Immigration Service was led into the position of assuming the burden to disprove the claim, and to thereby embark on an ex-

tensive interrogation of the witnesses having as its purpose the production of discrepancies. That all of the persons appearing as witnesses were "well coached" was well known to Immigration. The interception of numerous "transcripts" of the testimony to be memorized by each witness had conclusively established this fact. The attitude of mind of the examiner was obviously influenced by this knowledge and his purpose was to disclose discrepancies by breaking through the "story."

The objective is to probe an area where there may have been no preparation. The process is obviously tortuous, prolonged and seemingly exceedingly irrelevant as to the testimony adduced. Our question is still what proof is to be produced by the claimant?

Judge Bourquin was very clear on the question in *Ex parte Jew You On,* 16 F. 2d 153, 154 (1926), when he said:

> It is argued that, if the bare oath of two or three Chinese or other persons is not accepted, Chinese American citizens procreated in China will be barred from this country of their father's nativity. The answer is the responsibility is not the immigration officers' nor the court's. Like any case, the burden is the proponent's to prove it. Perhaps not unfamiliar registry systems might be adopted. Otherwise, this country is helpless, the exclusion policy futile, and the Chinese admitted will be limited solely by the extent there is courage to take advantage of opportunity.

Judge Garrecht in *Mui Sam Hun v. U.S.,* 78 F. 2d 612, 615, stated:

> The rule is not, as appellant contends that the applicant need only make out his case by a fair preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the Board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary or capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the Board.

With the above in mind let us turn to Judge Healy's opinion in *Quan Toon Jung v. Bonham,* supra, p. 919:

> Aside from the single item of the 1924 landing certificate, the showing of paternity was persuasive. On the occasion of Quan Siew's various other landings and departures the information given by him concerning the appellant and his other children squares with the present testimony. There were slight discrepancies, of course, as in the phonetic spelling of names, but these were not significant, and are readily explainable. *The testimony of the applicant and of the alleged father in support of the relationship is of such character as to compel belief.* On the great mass of intimate details testified to their accounts are confessedly in substantial agreement. There is no evidence of coaching, as the board of review concedes; and indeed coaching sufficient to produce the results obtained here would have been virtually impossible. Quan Siew and the boy had not seen each other in seven years and at the

> time of the inquiry they were separated by a distance of a thousand miles. If it were permissible to judge from their photographs it would be seen that the two so closely resemble each other as to further substantiate the belief that they are father and son. (Emphasis ours.)

The evidence submitted was in the familiar pattern —"I am the son"—"I am the father," followed by the belated attempt of the examiner by extensive interrogation to uncover a discrepancy.

Judge Bourquin's remarks at page 154 of *Ex parte Jew You On* are illuminating:

> In endeavor to avoid the usurpation (judicial invasion of executive domain), the immigration authorities have invented a more or less absurd rule of "discrepancies." That is by examination of immigrant and witnesses to develop contradictions, often collateral and trivial in character, and by reason of these to justify that which needs none—their disbelief of the immigrant's witnesses before them.

But to return to *Quan Toon Jung,* Judge Healy says the photographs of Leong Sing and Quan Siew are slender evidence of identity and that the Bureau at Washington was right in rejecting it. But says the judge, the examination of the photograph of Quon Siew and the boy affords further substantiation for the belief that they are father and son.

Judge Healy says there is substantial agreement on the great mass of intimate details testified to in their accounts.

Judge Roche in *Lee Mon Hong v. Brownell,* (affirmed by this Court) No. 13,957, has said "Had he (the plaintiff) been letter perfect in his answers to all the examiner's questions the Court might be more inclined to believe him an imposter reciting memorized material."

Judge Goodman in *Ly Shew v. Dulles,* supra, has specifically stated his trouble:

> The testimony at the trial, which lasted three days, was entirely given in the Toy Shan Chinese dialect and interpreted into English. Neither Ly Shew, the alleged father, nor the plaintiffs, nor the witnesses in behalf of plaintiff, could speak a word of English.
>
> Many times the interpreter carried on extensive dialogues with the witness before obtaining a response to a question propounded. Inconsistencies and contradictions in testimony became manifest. To fairly determine their effect is difficult if not impossible. Familiar as we are in this court with Chinese interpreted testimony, it can be categorically stated that it is well-nigh impossible to determine the credibility of such witnesses, at least after ten years of constant trial work, I find it so.

Judge Healy, in *Quan Toon Jung,* had no difficulty in reading a cold record, with no interpreter problem, and in reaching the conclusion that "the testimony of the applicant and of the alleged father in support of the relationship is of such character as to compel belief." It appears to us that the case had a strong

aroma of fraud. Immigration and the Court below had had no trouble detecting it.

Appellant submits that he has sustained the burden of proof by the preponderance of evidence and that since appellee presented no evidence, judgment should be for appellant.

This court in *Wong Kam Chong v. United States,* 111 F. 2d 707, 712, discussed the question of burden of proof and stated:

> Burden of proof in one sense means the duty to establish a certain fact by a certain degree of proof, such as a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. In another sense it means the duty to offer evidence or the duty to go forward with the evidence.

Where, as here, the evidence is solely within the possession of the appellant, the reasoning of counsel for appellant begs the question as to the duty of going forward and what constitutes a *prima facie* case in this sort of proceeding. Whether or not the showing made is *prima facie* depends upon the nature and extent of the burden of proof.

The courts of the United States have recognized the great difficulty confronting them as well as the Immigration Service in cases involving claims to United States citizenship.

In *Chin Bak Kan v. United States,* 186 U.S. 193 (1902) the Supreme Court stated:

> The facts on which such a claim (assertion of citizenship) is rested must be made to appear. And

> the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves under pressure of a particular exigency, without being able to show that it was ever possessed. (Words in parentheses ours.)

This court in *Lee Sing Far v. United States,* 94 Fed. 834 (C.A. 9) recognizing the problem stated at page 837:

> It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would as a general rule be impossible to do so.

II. THE EVIDENCE.

The only witnesses presented by appellant in the court below were the appellant and the alleged father, Wong Hie. Wong Hie testified that he had resided in the United States for his entire life with the exception of two years, during which period he visited China. Yet he testified in the Chinese language through an interpreter (TR 30 to 82).

Wong Hie testified that he was born in Yreka, California, Feb. 28, 1901; that he resided in the United States until 1924, at which time he visited China for a short period. He testified that he was married in 1925 in China; that he had two children born in 1926 and 1927; and that he returned to the United States in 1926 prior to the birth of the second child. Wong Hie was unable to testify as to the present whereabouts of relatives, and seemed vague

and uncertain regarding schooling and other facts of his own childhood. By his own testimony he had not seen Wong Gong Fay from the time of his departure from China in 1926 until the appellant, who represents himself to be Wong Fong Fay, arrived in the United States in 1951. Wong Gong Fay testified that he was born in China; that he saw his father after his birth, but "I was too young to know, but I saw him when I came to the United States." In addition to the testimony of the appellant and his alleged father, Wong Hie, there were offered into evidence the statement of Wong Hie on arrival in the United States that he had married in China and had a son, Wong Gong Fay, and a number of school records and tax returns. There were no other witnesses.

This is another example of the Chinese claim of citizenship based solely upon the allegation of the appellant and the alleged father, with no evidence whatever to establish the identity of the appellant. He concedes that he had never seen Wong Hie prior to his arrival in the United States, and Wong Hie concedes that he has not seen his son since infancy. Does such testimony establish the identity of the appellant as the son of Wong Hie? The transcript indicates that there were other witnesses available but were not called (TR 100).

CONCLUSION.

Appellant concludes his brief with the statement:

> The appellant therefore submits that the record substantially discloses that Wong Gong Fay is

the legitimate and natural son of Wong Hie, and as such is a national and a citizen of the United States, and is consequently entitled to a judgment determining the status of Wong Gong Fay as an American citizen.

Appellee has hereinabove set forth the proposition which appellant seeks to sustain in this case and which counsel seek to make applicable to all derivative 903 cases. *The assertion under oath in the District Court by the claimant and the alleged parent that they are parent and child establishes a preponderance of the evidence sufficient to sustain the burden of proof and the defense must move forward to disprove the claim.*

The evidence herein amounts to nothing more than an assertion by the claimant and the alleged father. It is submitted that the judgment of the court below should be affirmed.

Dated, San Francisco, California,
September 1, 1954.

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